THE COMMODITY CLAUSE LEGISLATION AND THE ANTHRACITE RAILROADS

SUMMARY

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THE "commodity clause" of the Act to Regulate Commerce (the Hepburn Act) provides that

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." [1]

Just what Congress was attempting to prevent may perhaps become clearer if the legislative history of the clause be followed.

The incorporation of the commodity clause into the Hepburn Act was, in considerable measure, due to

[1] 34 Stat. 584, c. 3591.

Senator Tillman of South Carolina. In connection with a resolution directing the Interstate Commerce Commission to conduct an investigation into coal and oil he expressed in the Senate on February 12, 1906, his dissatisfaction with the Hepburn bill — in the form in which it had passed the House on February 8, 1906. "I want," he said, "a provision in any railroad law that I vote for which . . . will prohibit any public carrier from owning and controlling a product which is carried over its line. I want this monopoly of the anthracite coal region . . . checked. I want a provision in this law . . . which will prevent any monopoly of the bituminous coal lands on the Atlantic Slope by the Pennsylvania Railroad and its allies. . . . I am going to offer an amendment in committee, and if I do not get it in the bill there I am going to offer it in the Senate, looking to . . . preventing this particular wrong." [1] Senator Tillman, who was put in charge of the Hepburn bill when it came before the Senate, was strongly in favor of effecting a separation of the businesses of transporting and of mining coal. Furthermore, judging from the opinions later expressed on the floor of the Senate, there appeared to be general agreement upon this fundamental point. Even Senator Foraker, one of the three senators who voted finally against the bill, went so far as to say, "I do not believe that a common carrier should be engaged in any business except only that of a common carrier. I do not believe that a common carrier should be allowed to own coal mines and operate them, except only possibly where they have a vested right with which we have no power to interfere." [2]

However, it was three months after the Hepburn Act had passed the House before the commodity clause

[1] Cong. Record, February 12, 1906, p. 2428.

[2] Ibid., March 12, 1906, p. 3672.

in any form was introduced into the bill in the Senate. It had not been a part of the original Hepburn bill, was not in the act as it passed the House on February 8, 1906, and had not even been suggested by the Roosevelt administration. It was not referred to the Senate Committee on Interstate Commerce; in fact, at the hearings of the Senate Committee in the previous year no proposition looking toward any interference with the railroads engaged in industrial activities was even considered. But on May 7, only eleven days before the Hepburn Act first passed the Senate, an amendment was proposed by Senator Elkins embodying the principle of a severing of the functions of transportation and of production. In introducing his amendment, Senator Elkins said, " I want to confine the railroads to the legitimate business for which they were incorporated — the transportation of freight and passengers — and to forbid them engaging in any other business, especially the business of mining, producing, and selling coal or any other commodity on their lines in competition with a shipper." [1] This amendment, which was to come at the end of Section 1, provided that " It shall be unlawful for any common carrier subject to the provisions of this act, unless authorized by its charter to do so, to engage, directly or indirectly, in the production, manufacture, buying, furnishing, or selling of coal or coke or any other commodity or commodities of commerce in competition with any shipper or producer on its line or lines: provided, That nothing in this act shall be construed to prevent a carrier from mining coal exclusively for its own use." [2] The proviso, " unless authorized by its charter to do so," was inserted as Senator Elkins said, in order to be fair

[1] Cong. Record, May 7, 1906, p. 6456.

[2] Ibid., May 7, 1906, pp. 6455–6456.

to the railroads which had been authorized many years previously to conduct the business which it was now proposed to regulate, but upon the objection of Senator Gallinger of New Hampshire, the qualifying proviso was struck out.[1] The amendment of Senator Elkins prohibited a common carrier from engaging in the production of coal. Senator Bailey objected that regulation of the production of coal was beyond the jurisdiction of Congress, and that the prohibition should, therefore, take the form of denying the privilege of interstate commerce to any common carrier engaged in the production or distribution of coal.[2] It was pointed out, however, by Senator Daniel of Virginia, that a common carrier should not be prohibited from engaging in interstate commerce, but only from carrying in interstate commerce any articles which were produced by it in competition with other shippers.[3] An amendment to this effect, proposed by Senator McLaurin of Mississippi and later accepted by Senator Elkins, passed the Senate May 9 by a vote of 67 to 6, — 16 not voting.[4]

With one important exception this amendment coincided in its most significant features with the language of the commodity clause as incorporated in the Hepburn Act, in the form in which the bill passed the Senate on May 18.[5] This exception was the treatment of timber and the manufactured products thereof. During the course of the debates it was urged by a number of Senators that the clause would work a great hardship on those lumber companies which had built their railroads for the purpose of getting the lumber out of the forests and to market. The pressure they

[1] Cong. Record, May 7, 1906, p. 6456.

[2] Ibid., May 7, 1906, p. 6456.

[3] Ibid., p. 6458.

[4] Ibid., May 9, 1906, p. 6570.

[5] See p. 583.

were able to bring to bear was sufficient to induce the Senate to accept, on May 17, the amendment of Senator Piles of Washington, that the prohibitions of the clause should not apply to timber and the manufactured products thereof.[1] The pressure of other interests was also observed in the attempt to limit the scope of the clause. The term common carrier included pipe lines for oil, natural gas, and other commodities. Friends of these interests endeavored to secure the adoption of an amendment specifically exempting pipe lines from the prohibitions of the clause. This amendment failed to pass the Senate,[2] but its object was attained by the substitution in conference of the term "railroad company" for "common carrier." An attempt was made, also, to relieve those railroad companies which were incidental to industrial enterprises from the operation of the clause by limiting its application to those common carriers whose principal business was that of a common carrier. This amendment, however, which would also have relieved pipe lines was defeated in the Senate.[3]

The Hepburn Act passed the Senate on May 18 by the large majority of 71 to 3 — with 15 Senators not voting. The commodity clause at this stage made it unlawful for any common carrier to transport in interstate commerce any article, other than timber and its manufactured products, which had been manufactured, mined, or produced by it, or under its authority, or which it owned in whole, or in part, or in which it had any interest direct or indirect. It did not state specifically that the ownership by a railroad of stock in a subsidiary mining or producing company constituted

[1] Cong. Record, May 17, 1906, pp. 7012, 7015.

[2] Ibid., May 17, 1906, p. 7016.

[3] Ibid., p. 7015.

such an interest as was forbidden by law. Senator Tillman, a steadfast advocate of the principle of divorcing transportation and production, had introduced, on May 8, an amendment to prohibit carriers from engaging in interstate commerce, when they were interested by stock ownership or otherwise in mining or producing those commodities which they transported in interstate commerce.[1] His amendment, however, was not put to vote. On May 17 he called the attention of the Senate to the fact that the commodity clause in its present form (which was substantially the form of the clause as finally enacted) did not cure the evils for which it had been designed. It did not prohibit the ownership of coal properties through the ownership of stock in coal mining companies; it did not touch the ownership of railroads by coal companies nor the common ownership of railroads and coal companies, and it did not prevent the control of coal companies by the officials of the railroads. Senator Tillman therefore introduced a comprehensive amendment which met these objections, but which he himself stated was perhaps somewhat broad and drastic.[2] The amendment was voted down without roll call, presumably because of its comprehensiveness. Senator Tillman, thereupon, endeavored to have the words, "by partnership, stock ownership, or any arrangement whatsoever"[3] inserted in the Elkins amendment, which would have caused the clause to read in substance: It shall be unlawful for any common carrier to transport in interstate commerce any article in which it may have any interest, direct, or indirect, by partnership, stock ownership, or any arrangement

[1] Cong. Record, May 8, 1906, p. 6513.

[2] Ibid., May 17, 1906, p. 7012.

[3] Ibid.

whatsoever. This amendment was, however, voted down, 23 to 42.[1]

As the House of Representatives disagreed to the amendment attached to the Hepburn Act by the Senate, the bill was sent to conference. The conference committee made a report on June 2, recommending with respect to the commodity clause that it should be made to apply to timber and its manufactured products and that the District of Columbia should be substituted for the district of the United States.[2] The Senate on June 7 and the House on June 12, rejected the conference report, and appointed new conferees. The report of the second conference was presented on June 23. It recommended that timber and its manufactured products be exempted from the prohibitions of the clause and that railroad be substituted for common carrier;[3] obvious concessions to the timber and oil interests respectively. Senator Tillman, one of the conferees, refused to sign the report on the ground that the influences behind these changes were too sinister.[4] After a prolonged debate on the conference report, in which the pipe line controversy occupied an important part, the Senate, on June 26, disagreed to the report, and the House still disagreeing to the amendments of the Senate, a third conference committee was appointed. Its report was made on June 28, the only change affecting the commodity clause being a substitution of the term railroad company (the legal entity) for railroad, which refers to physical property. Senator Tillman, as before, refused to sign the report, largely because of his disagreement with the recommendations of the conference as to the commodity clause.[5] The report, however,

[1] Cong. Record, May 17, 1906, p. 7014.
[2] Ibid., June 2, 1906, p. 7741.
[3] Ibid., June 23, 1906, p. 9078.
[4] Ibid., June 25, 1906, p. 1901
[5] Ibid., June 28, 1906, p. 9522.

was accepted by both houses, and the Hepburn bill became law on June 29, 1906.

In the suits that have been brought by the Government to enforce the commodity clause it has been claimed by the railroads that the clause was introduced hastily, and passed with little understanding of its true import, or its far reaching consequences. So far as the history of this session in Congress is concerned, the first contention is substantially correct. The clause was not a part of the original House bill — in fact it had not even been considered in the House — and was first introduced in the Senate only eleven days prior to the first passage of the Hepburn bill by the upper body. Fundamental changes, such as the application of the principle to railroads only, not to all common carriers, were made in conference, but these changes did not affect the anthracite carriers. So far as concerns the form of the measure, the limited opportunity for debate under the fifteen minute rule undoubtedly resulted in a more hastily considered phraseology than the importance of the subject demanded, tho it does not follow that this operated to the disadvantage of the interests to be thereby affected. Had a longer discussion obtained, the clause might have been made really effective by specifically prohibiting a railroad from holding stock in a company mining or producing articles which were to be transported by the railroad in interstate commerce. The changes made in conference relieving all common carriers except railroads from the provisions of the clause might also have met with more opposition, had not Congress been anxious to secure the speedy passage of the bill.

But when the principle of the clause rather than its phraseology is considered, it should be noted that

as far back as 1892, a Congressional Committee, after an extended investigation, came to the conclusion that the public interest demanded that the business of a common carrier should be absolutely separated from any other.[1] This also was the consensus of opinion in the Senate in 1906, tho later in the course of the debate some Senators objected to carrying the principle so far as to affect the interests of their own constituents. Furthermore, the Interstate Commerce Commission, in its report upon the bituminous coal industry early in 1907, — a report based upon hearings early in 1906, — favored the application of the commodity clause principle to the soft coal roads, and even went so far as to recommend that no officers or employees of a railroad be permitted to have any interest in any coal properties or coal companies along the line of the railroad.[2] The far reaching character of the legislation was frequently emphasized in the debates in the Senate. The fact, furthermore, that the railroads were given two years in which to comply with the law is evidence that the Senators believed that fundamental changes would be rendered imperative by the passage of the clause.

The anthracite coal carrying roads may be divided into three groups, according to the manner in which they would presumably be affected by this enactment.

First, the Philadelphia and Reading Railway Company, which, with the Philadelphia and Reading Coal and Iron Company, was jointly owned by the Reading Company, a holding company. Second, the Lehigh Valley, the Central Railroad of New Jersey, the Erie, the Pennsylvania, and the New York, Ontario and

[1] House Report, 1892–93, no. 2278, p. viii.

[2] Annual Report, I. C. C., 1907, p. 22.

Western, which seemed to be interested, indirectly at least, in the coal transported by them, because of their ownership of the stock of coal mining companies. Third, the Delaware, Lackawanna and Western, and the Delaware and Hudson, which mined their coal directly. The Delaware, Lackawanna and Western, and the Delaware and Hudson also owned stock in some coal companies, but these holdings, especially in the case of the Lackawanna, were very small.

The Philadelphia and Reading Railroad Company, the predecessor of the Philadelphia and Reading Railway Company, had possessed under its charter no authority to own coal lands. It had organized, therefore, in 1871, the Philadelphia and Reading Coal and Iron Company, which was given the power to acquire coal properties and to engage in mining operations. The act of incorporation provided, also, that it should be lawful for any railroad company in the state of Pennsylvania to purchase the stock of the coal and iron company.[1] The Philadelphia and Reading Railroad immediately purchased its entire capital stock and continued to conduct mining operations in this manner until 1893. In that year the railroad failed and became divested of the shares of the coal company. In the reorganization of the railroad, it was necessary to accept the provisions of the Pennsylvania State Constitution of 1874, which made it illegal for the railway to hold coal lands. If the ownership of the railroad and of the coal properties were to be reunited, some device had to be invented wherewith to evade the constitutional prohibition. This was accomplished through the medium of a holding company, owning both the Philadelphia and Reading Railway Company and the Philadelphia and Reading Coal and Iron Company.

[1] Laws of Penn., 1871, no. 817.

This relation has continued up to the present time (1911). The Reading Company still holds the entire capital stock of the Philadelphia and Reading Railway Company, and of the Philadelphia and Reading Coal and Iron Company. These three companies have the same president and the same treasurer. Five of the six directors of the Reading Railway Company constitute five of the six directors of the Reading Coal and Iron Company, and all of the directors of both of these companies are on the directorate of the Reading Company, constituting, in fact, two-thirds of the directors of that company. The Philadelphia and Reading Railway Company pays an annual dividend of nearly 12 per cent, which goes, as a matter of course, to the Reading Company.[1] The Philadelphia and Reading Coal and Iron Company has never paid a dividend.[2] Indeed, it owes the Reading Company $74,423,817,[3] carried as an open account. Most of this represents advances which had been made by the Philadelphia and Reading Railroad Company prior to 1896, the debt of the mining company to the railroad company having been transferred in the reorganization to the Reading Company.[4] Upon this enormous indebtedness the Philadelphia and Reading Coal and Iron Company pays a varying rate of interest. President Baer admitted in 1903 that "the rate of interest the Coal and Iron Company pays depends upon yearly earnings of the company and we have no agreement

[1] Annual Report of the Reading Company, 1911, p. 3.

[2] Transcript of Record, Supreme Court of the United States, October Term, 1911. The United States, Appellant, v. The Reading Company, the Philadelphia and Reading Railway Company, *et al.* 6 vols., vol. ii, p. 190. Referred to hereafter as Transcript of Record in Sherman Anti-Trust Case, to distinguish it from the Transcript of Record in the Commodity Clause Cases.

[3] Annual Report of the Reading Company, 1911, p. 55.

[4] Transcript of Record in Sherman Anti-Trust Case, vol. ii, pp. 190–191.

as to a fixed rate of interest." [1] In 1902 the coal company paid only $1\frac{1}{8}$ per cent which " was all we thought the Coal and Iron Company could afford to take out of its earnings that year and pay over to the Reading Company." [1] In 1908 the coal company paid the Reading Company two per cent interest, which was as high a rate as it had ever paid up to that time.[2] Since 1908 the rate has regularly been less than two per cent, and in 1911 was as low as one-half of one per cent.[3] Notwithstanding this low rate of interest the coal and iron company is frequently operated at a loss. The results of its operations for the last six years are as follows:[4]

1905–1906 Loss	$71,482
1906–1907 Loss	130,745
1907–1908 Profit	207,523
1908–1909 Profit	66,973
1909–1910 Loss	71,500
1910–1911 Loss	103,316

In the year 1910–11, the Reading Company accepted on the sum due it from the Reading Coal and Iron Company one-half of one per cent. Mr. Baer admitted that if the coal and iron company were charged the regular rate of interest, it would probably be conducted at a loss every year.[5] Its frequent deficits, which are borne by the Reading Company, are mainly due to the high freight rates charged by the Reading Rail-

[1] Files of Interstate Commerce Commission in case of W. R. Hearst v. Philadelphia and Reading Railway Company. Testimony, vols. i–ix, pp. 1–4377. p. 556. Referred to as Files of Interstate Commerce Commission.

[2] Transcript of Record in Sherman Anti-Trust Case, vol. ii, pp. 190–191.

[3] Annual Reports of the Reading Company.

[4] Annual Reports of the Reading Company. The annual reports of the Reading Company, the Railway, and the Coal Company are published in the same pamphlet, and tho their operations are given separately, the results of their combined operations are also shown.

[5] Files of Interstate Commerce Commission, p. 970.

road. Any losses thus incurred by the coal company are counterbalanced by the large profits made by the railroad on the transportation of coal. Since both the coal company and the railroad are entirely owned by the Reading Company, it is immaterial to the Company whether its profits come from the mining of coal or from its transportation. Whether freight rates are high or low makes a great deal of difference, however, to the independent operators, and it would appear that the desire to bring about their elimination is the real explanation of such an adjustment of freight rates as results in the mining operations of the railroad coal companies being carried on at an apparent loss. Incidentally it may be observed, also, that this complex organization has made more difficult the judicial determination whether the railway has an interest in the coal transported by it in violation of the commodity clause.

The more usual method, however, of carrying on coal mining operations is through the ownership of the stock of coal mining companies. The relation of the Lehigh Valley Railroad to the Lehigh Valley Coal Company illustrates this method.

The Lehigh Valley Railroad owns all the stock ($1,965,000) of the Lehigh Valley Coal Company, one of the largest coal mining companies. The railroad and the coal company had, in 1908, the same president, vice-president, treasurer and secretary; most of the members of the executive committee of the coal company were on the executive committee of the railroad,[1] and two of the six directors of the coal company were directors of the railroad. The Lehigh Valley Coal Company has never paid a dividend;[2]

[1] Transcript of Record in Sherman Anti-Trust Case, Exh. 58.

[2] Ibid., vol. v, p. 771.

in fact, it has frequently borrowed large sums from the railroad. It was observed in the annual report of the Lehigh Valley Railroad for 1901 that "under the existing arrangements the Lehigh Valley Coal Company is compelled to depend upon the Railroad Company for working capital to carry on its operations," [1] and during the year ending in November, 1901, one million dollars was advanced by the railroad to the coal company.[2] Mr. Walter, formerly president of the Lehigh Valley Railroad, testified in 1904 that during his administration the coal company had always borrowed of the railroad when it wanted money.[3] The present indebtedness of the coal company to the railroad is $10,537,000, represented by certificates of indebtedness. About one-half of these were given by the coal company to the railroad in return for the stocks of some coal companies purchased from the railroad, and the other half represented an exchange for some bonds of the coal company, which had been held by the railroad. Upon these certificates no interest has ever been paid by the coal company.[4] In addition to this free loan the railroad has guaranteed $12,596,000 of the bonds of the coal company, a large part of which represents advances made to it by the railroad. The interest on these bonds is now paid by the coal company, but prior to 1903 or 1904 it had been paid, in some cases, by the railroad.[5] The capital stock of the Lehigh Valley Coal Company is part of the security for the general mortgage executed by the Lehigh Valley Rail-

[1] Annual Report of the Lehigh Valley Railroad, 1901, p. 25.

[2] Ibid., 1901, p. 25.

[3] Files of Interstate Commerce Commission, p. 2334.

[4] Transcript of Record in Sherman Anti-Trust Case, vol. v, p. 793. In 1912 the Lehigh Valley Coal Company redeemed and cancelled these certificates of indebtedness and paid the arrearages of interest at a rate of 4 per cent per annum. Annual Report of the Lehigh Valley Coal Company, 1912, p. 7.

[5] Transcript of Record in Sherman Anti-Trust Case, vol. v, pp. 772, 778.

road in 1903 under which mortgage bonds to the amount of $23,539,000 have been issued.[1] Among other considerations that indicate the practical oneness of these two companies may be mentioned the fact that the Lehigh Valley Coal Company has leased some of its lands to tenants upon the condition that their output be transported over the Lehigh Valley Railroad.[2] And the fact that the railroad has been willing to lend money to the coal company without requiring the payment of any interest thereon would appear to show conclusively that the two are practically identical.

The identity of the railroad and the coal company has received judicial recognition. In the case of the *Lehigh Valley Railroad Company v. Rainey,* it was held of the relations of the railroad to the coal company that " the identity of interest between the two corporations was so plain that it seemed idle to question it." [3] Judge Buffington held in 1910, that in work, profit, interest, and official personnel the coal company was but an alter ego of the railroad itself.[4] In speaking of the relation of the Lehigh Valley Railroad to the Lehigh Valley Coal Company the Supreme Court held that it was clear " that the fact averred tended to show an actual control by the Railroad Company over the property of the Coal Company and an actual interest in such property beyond the mere interest which the Railroad Company would have had as a holder of stock in the Coal Company." [5]

[1] Transcript of Record in Commodity Clause Cases, Supreme Court of the United States, October Term, 1908, no. 564. The U. S. v. The L. V. R. R. Co., p. 19.

[2] Bond Record, May, 1896, p. 368.

[3] 112 Fed. Rep. 487.

[4] 183 Fed. Rep. 461. Decision of Circuit Court, December 8, 1910.

[5] 220 U. S. 272. Decision of Supreme Court in U. S. v. L. V. R. R., Co., April 3, 1911.

This practical identity of railroad and coal mining company holds true also for the Central Railroad of New Jersey, the Erie, the Pennsylvania, and the New York, Ontario and Western, all of which own the stock of coal mining companies, tho not in every case is it true, as with the Lehigh Valley, that the railroad owns all of the stock of its constituent coal companies.

In marked contrast, however, to most of the anthracite carriers, the Delaware, Lackawanna and Western Railroad owns its coal lands directly and mines its own coal. With the exception of a part interest in the Temple Iron Company, it has no subsidiary coal mining companies. It does own the capital stock of two coal companies, the Lackawanna Valley Coal Company and the Glen Alden Coal Company, but neither of them produces any coal, and only one of them, the Glen Alden Coal Company, owns any coal lands, its holdings amounting to less than two acres.[1] The Lackawanna Railroad in the past has absorbed a number of coal companies, but these have always been merged with it, so that it now conducts mining operations directly through its own coal department.[2]

The railroad has been very profitable. Dividends have been paid regularly since 1880, and have averaged 27 per cent per annum for the past ten years.[3] There was also a stock dividend of 15 per cent in 1909, and stockholders were in 1912 given the privilege of subscribing at par for stock equal to 40 per cent of their holdings, the market price of the stock at the time being $583.[4] Inasmuch as some 40 per cent of the earnings

[1] Transcript of Record in Sherman Anti-Trust Case, vol. ii, p. 579 and Transcript of Record in the Commodity Clause Cases, no 562. The U. S. v. D. L. & W. R. R. Co., p. 12.

[2] For an account of the recent organization of a coal selling company, see p. 607.

[3] Annual Reports of the Lackawanna Railroad and Poor's Manual, 1913, p. 1394.

[4] Chron., 95: 1745, 1912.

of the railroad come from the transportation of coal, mainly anthracite, it is evident that the business of mining and transporting coal, judging by the combined results of the two operations, is profitable, and that the failure of many coal companies to show a profit is due to the adoption of a system of accounting which credits the railroad with profits jointly earned by the railroad and its coal company.[1]

The Delaware and Hudson Company, like the Lackawanna, mines coal from its own lands. It keeps an account in its books with the coal department, but this is a mere bookkeeping charge, as practically all of the coal shipped over the railroad is the product of its own mines.[2] The Delaware and Hudson, however, owns the stock of several companies owning coal lands and engaged in the production of coal. It holds the entire capital stock ($1,500,000) of the Northern Coal and Iron Company, and of the Jackson Coal Company ($100,000). The Delaware and Hudson acquired, in March, 1901, all the stock ($100,000) of the Hudson Coal Company, which in 1905 purchased the stock of the Schuylkill Coal and Iron Company ($1,000) and of the Shanferoke Coal Company ($5,000).[3] On account of the decision of the Supreme Court in the Commodity Clause case, the Delaware and Hudson arranged in 1909 [4] to sell its whole present and future output to the Hudson Coal Company.[5] The officers and directors of these various companies are mainly drawn from those of the Delaware and Hudson Com-

[1] In the case of the coal companies of the Reading, the Central Railroad of New Jersey, and the Lehigh Valley, the interest charges on their enormous holdings of undeveloped coal lands explain, in part, the frequently recurring deficits.

[2] Transcript of Record in Sherman Anti-Trust Case, vol. iii, Exh. 169.

[3] Transcript of Record in Sherman Anti-Trust Case, vol. iii, Exh. 123.

[4] See p. 610.

[5] Annual Report of the Delaware and Hudson Company, 1910, p. 10.

pany.[1] The Delaware and Hudson has been well managed, and has been prosperous. Dividends have been regularly paid since 1840. During this time six stock dividends aggregating 87 per cent have been distributed, and yet the rate of cash dividend has averaged nearly 7.5 per cent.[2] And since 1907 the rate of dividend has regularly been 9 per cent. This dividend record[3] confirms the conclusion reached in the case of the Lackawanna Railroad, that coal mining operations are profitable, but that the practical identity of railroad and coal company explains in many cases why the mining end of the business fails to register a profit.

Such were the relationships between the anthracite railroads and the coal mining companies at the time when the passage of the commodity clause apparently made it necessary for the railroads to divorce themselves from their coal business.

Compliance with the law, however, was more difficult in most cases than might appear at first glance. It is true that the Lackawanna Railroad, whose coal property was unmortgaged, could have sold its coal lands, and the Pennsylvania Railroad, which held its stock in coal mining companies free of encumbrance, could have disposed of its shares. But the situation in the case of the other carriers was more complex. In most cases the railroads had mortgaged their coal lands as security for long term bonds. These mortgages had been placed directly upon the land where the land was directly owned, and upon the stock of the coal companies where the land was owned by a subsidiary coal company. In the case of the Delaware and Hud-

[1] Transcript of Record in Sherman Anti-Trust Case, vol. iii, Exh. 123.

[2] Annual Reports of the Delaware and Hudson Company and Poor's Manual, 1913, p. 1376.

[3] Forty-six per cent of the earnings of the Delaware and Hudson Company are derived from the transportation of coal.

son, for example, all of its coal bearing lands in Pennsylvania, together with all its railroads in Pennsylvania north of Scranton, were subject to the lien of a mortgage securing $5,000,000 bonds maturing in 1917. These liens were upon both the railroad and the coal property.[1] The Lehigh Valley, the Erie, the Central of New Jersey, and the Reading, on the other hand, had mortgaged the stocks of their principal coal companies to secure the bonds issued by the respective railroads. For example, the Lehigh Valley had deposited the stock of the Lehigh Valley Coal Company, of the Hazelton Coal Company, and of several other companies, as part security for its General Consolidated Mortgage, executed September 30, 1903, under which bonds to the amount of $23,539,000 had been issued, which were outstanding in the hands of the public. There was an absolute inhibition in the mortgage against releasing the stocks of the Lehigh Valley Coal Company and the Hazelton Coal Company from the operation of the indenture, and the stocks of the other coal companies could not be released from the lien, unless their alienation, in the opinion of the trustee, would not be detrimental to the security of the bonds.[2] The general mortgage of the Reading Company also contained an inhibition against any separation of the railroad and the coal properties. The two mortgages of the Erie Railroad, secured in part by the deposit of the stock of the Hillside Coal and Iron Company and of the Pennsylvania Coal Company, contained no provision for a release of the stocks pledged.[3] The general mortgage of the Central Railroad of New Jersey,

[1] Transcript of Record in Commodity Clause Cases, no. 565. The U. S. v. The D. and H. Co., p. 12.

[2] Ibid., no. 564. The U. S. v. The L. V. R. R. Co., pp. 19, 23 seq.

[3] Ibid., no. 567. The U. S. v. The C. R. R. Co. of N. J., pp. 9–10, 15–18, 41.

secured in part by the bonds and stocks of the Lehigh and Wilkes-Barre Coal Company, did make provision for releasing the property pledged, providing no objection to the release was made by the trustee.[1]

In every case where the coal properties had been mortgaged the bonds were secured by both the railroad and the coal properties. The mortgage debt of the railroads which had thus pledged their railway and coal properties aggregated over $400,000,000, and most of the bonds had long terms to run. The existence of these mortgages presented a real difficulty in any separation of the railroads and their coal lands. This separation was likely to meet with considerable opposition from bondholders, who would fear a diminution of their security because of the danger that part of the coal tonnage might be shipped over another railroad.

Because of these difficulties, which were accentuated by the panic of 1907 and the resulting depression, and because it was believed that the commodity clause would be held by the courts to be unconstitutional, practically no effort was made by the principal coal roads to comply with the law. The Buffalo, Rochester and Pittsburgh attempted to reorganize in such a way as to comply with the law without running any risk of losing its coal tonnage. It organized the Mahoning Investment Company, and transferred to this company for a nominal consideration the coal lands of the railroad. It then distributed the shares of the Investment Company pro rata among its stockholders.[2] The profits on the mining of coal thus went directly to the stockholders of the railroad, without passing through the hands of the railroad itself. The Louisville and Nashville and a few other roads succeeded

[1] Transcript of Record in Commodity Clause Cases, no. 567. The U. S. v. The C. R. R. Co. of N. J., pp. 9–10, 15–18, 41.

[2] Chron., 85: 373, 1907.

in disposing of their coal properties. The attempts to comply with the law were, however, few in number and were confined mainly to the soft coal roads.

The seriousness of the situation, largely because of the enormous fines which a violation of the clause would entail, was sufficiently realized by the Government. The Department of Justice announced in the middle of January, 1908, that proceedings would be brought, as soon as possible after the clause went into effect, but that meanwhile the railroads were not to be prosecuted for a failure to comply with the terms of the act, provided they coöperated with the Government and immediately in good faith obeyed the decision of the Supreme Court when rendered.[1] Somewhat later an effort was made in the Senate to postpone the operation of the clause. On the 31st of March, 1908, Senator Elkins introduced a Joint Resolution to suspend the commodity clause. As amended by the Committee on Interstate Commerce to which it had been referred, this resolution provided for a suspension of the penalties of the clause until January 1, 1910, but the instituting of proceedings for the enforcement of the clause was not to be affected in any way. Consideration of the measure was taken up by the Senate on April 28, 1908. Its passage was urged by Senator Elkins on the ground that the railroads had tried to make the necessary financial arrangements, but had been unable to do so, because of the panic of 1907. He urged that it was only fair to suspend the clause until the law could be tested.[2]

The Joint Resolution had the support of the Interstate Commerce Commission. In a letter to the Senate dated April 2, 1908, this body, without stating its

[1] Chron., 86: 227, 1908.

[2] Cong. Record, April 28, 1908, p. 5331, and May 1, 1908, p. 5533.

reasons, urged the passage of the resolution.[1] In response to a request of the Senate directing it to state its reasons, the Commission replied (May 8) that the financial depression had produced conditions presumably not anticipated when the clause was enacted. The enforcement of the clause now would, in its opinion, work considerable hardship, particularly on the independent coal operators, who were mining coal from lands leased from the Pocohontas Coal and Coke Company, owned by the Norfolk and Western Railroad, and shipping their product over its line. The railroad, according to the counsel of the Interstate Commerce Commission, was unable to dispose of its coal lands, and consequently would be unable to carry the coal of the independent operators. The Commission, therefore, favored a suspension of the penalties until January 1, 1910, in order to give the courts time to test the validity of the clause.[2]

On the 13th of May, Senator Foraker, who had taken a prominent part in the debate, introduced a substitute amendment, which provided that the clause should "not apply to any article or commodity lawfully acquired and owned prior to the 29th day of June, 1906, by any railroad company under and by virtue of any statute, franchise, or charter lawfully issued by the United States or any State or territory thereof." [3] On account of his illness a vote on this amendment was not taken until May 22. On that date it was defeated by 23 to 32, — 37 not voting.[4] On the 4th of January, 1909, the resolution of Senator Elkins came up again for consideration, but was laid aside for several successive days, and after January 11, 1909, apparently was not taken up again.

[1] Cong. Record, May 1, 1908, p. 5533.
[2] Ibid., May 13, 1908, pp. 6193–6194.
[3] Ibid., p. 6202.
[4] Ibid., May 22, 1908, p. 6754.

But meanwhile, on May 1, 1908, the commodity clause had gone into effect. On the 5th of June, 1908, the Government began its suit against the anthracite carrying railroads by filing in the Circuit Court for the Eastern District of Pennsylvania bills of equity and alternative writs of mandamus against the Philadelphia and Reading, the Lackawanna, the Delaware and Hudson, the Lehigh Valley, the Central of New Jersey, the Erie and the Pennsylvania. The suit against the Reading, however, was not pressed, as its interest in the coal transported by it was less direct than was that of the other railroads; the Government attempted to secure a decision first upon the other cases. It was charged in these proceedings that certain of the defendant railroads were directly engaged in mining operations, and others indirectly engaged through the ownership of the capital stock of subsidiary coal companies, and that all the railroads were transporting the coal so mined in interstate commerce in violation of the commodity clause.[1]

The first decision in the Circuit Court, September 10, 1908, was against the government. That court (Justice Buffington dissenting) held the commodity clause to be "a practical violation of the letter and spirit of the fifth amendment," [2] and intimated further that it was not within the commerce clause of the constitution, since entire exclusion from interstate commerce was not to be deemed a regulation of it.[3]

[1] 164 Fed. Rep. 217.

[2] The enforcement of the act, the Court held, "will compel the defendants to cease mining and transporting such coal, while still retaining their ownership or interest therein, . . . or, they will be compelled to surrender and divest themselves of title thereto by a compulsory sale of these coal lands and stock in coal companies. When we consider the magnitude of the sacrifice that must certainly attend such a sale, from throwing upon the market at once these properties, . . . it will be manifest that either alternative means a deprivation of property of enormous value by the mere command of the statute, without process of law or just compensation therefor."

[3] The text of the decision is in 164 Fed. Rep. 217 seq. See especially pp. 226, 232, 229, and (for the dissenting opinion) 252–254.

An appeal was at once taken to the Supreme Court, which rendered its decision [1] on May 3, 1909, less than a year after the original suit had been brought. The clause was declared to be within the power of Congress.[2] The Supreme Court held that the commodity clause " applies four generic prohibitions, that is, it forbids a railroad carrier from transporting in interstate commerce articles or commodities, 1, which it has manufactured, mined or produced; 2, which have been so mined, manufactured or produced under its authority; 3, which it owns in whole or in part ; and, 4, in which it has an interest, direct or indirect." [3] The court noted that the first two prohibitions, if literally construed, operated upon the right to transport a commodity because of an antecedent act of manufacturing or mining, whereas the last two prohibitions spoke in the present, referring to ownership at the time of the transportation of the commodity. Should the first two be held to prohibit, irrespective of the relation of the carrier to the commodity at the time of transportation, and should the last two only prohibit ownership at the time of transportation, the result would be, said the Court, to give the statute a semi-annihilative meaning. It treated these four prohibitions, however, " as having a common purpose, that is, the dissociation of railroad companies prior to transportation from articles or commodities, whether the association resulted from manufacture, mining, production or ownership, or interest, direct or indirect." [4] The Supreme Court noted that the first two prohibitions

[1] 213 U. S. 366–419.

[2] An interpretation was put upon the commodity clause by the Supreme Court which made it unnecessary to pass upon the constitutional questions raised by the Circuit Court; but these constitutional questions presumably will come up again before the Supreme Court for final determination.

[3] 213 U. S. 408.

[4] Ibid., 412.

were radical and the last two more reasonable. It restrained, therefore, the wider and more doubtful prohibitions in order to make them accord with the narrower and more reasonable ones, which provided for dissociation at the time of transportation. A railroad was not, therefore, it was held, forbidden to transport articles which had been mined by it or which it had previously owned, provided it had dissociated itself from these articles prior to the act of transportation.

It might, however, be held that some of the railroads had an "interest," direct or indirect, in the coal transported by them, even tho it had not been directly mined or owned by them at any time prior to the act of transportation. The Supreme Court, therefore, proceeded to analyze the nature of the interest, direct or indirect, which was prohibited by the commodity clause and which it had interpreted to refer only to an interest at the time of transportation. The Government had contended that since the statute referred to *any* interest, direct or indirect, it prohibited the transportation of commodities, mined by a *bona fide* corporation in which the carrier held a stock interest, however small. The contention of the railroads, on the other hand, had been that interest included only commodities in which the carrier had a legal interest, and did not prohibit the transportation of commodities mined by a separate corporation in which the transporting carrier held stock. The Supreme Court held that, if the interest referred to meant a legal or equitable interest, the mere ownership of stock in a distinct corporation did not prohibit a carrier from transporting in interstate commerce articles mined by that corporation. It was admitted by the prosecution that this would follow were the clause to be interpreted to

mean a legal interest. The question in dispute, then, was this: did the interest mentioned in the act refer merely to a legal interest? The Government maintained that the term interest should be interpreted broadly, including such as is involved in the ownership of stock in a subsidiary coal company. If interest were to be taken to mean merely a legal one, the commodity clause would be without significance. The Court held, however, that this was not true. It pointed out that the Senate had rejected an amendment which specifically provided that interest, direct or indirect, was intended among other things to embrace an interest resulting from ownership of stock. The failure, held the Court, to provide for this contingency in express language gave rise to the implication that it was not the purpose to include it.

"At all events, in view of the far-reaching consequences of giving the statute such a construction as that contended for . . . and of the questions of constitutional power which would arise if that construction were adopted, we hold the contention of the Government not well founded. We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (*a*) When the article or commodity has been manufactured, mined or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (*b*) When the carrier owns the article or commodity to be transported in whole or in part; (*c*) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder." [1]

Justice Harlan held, in a dissenting opinion, that the act, reasonably and properly construed, included within its prohibitions the transportation of coal by

[1] 213 U. S. 414–415.

a railroad company, if, at the time, it were the owner, legally or equitably, of stock — certainly if it owned a majority or all the stock — in the company which mined, manufactured or produced, and then owned, the coal which was being transported by the railroad company. Any other view of the act, he held, would enable the transporting railroad company, by one device or another, to defeat altogether the purpose which Congress had in view, which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners of coal. Justice Harlan did not present any argument sustaining his dissenting opinion. He deemed it unnecessary to do more than express his non-concurrence, inasmuch as the cases had been determined wholly on the construction of certain parts of the act which Congress could revise if it deemed it desirable.

The rejection by Congress of an amendment specifically providing that the ownership of stock in a subsidiary corporation constitutes such an interest as is forbidden by the commodity clause, implied, the Supreme Court held, that Congress did not intend to prohibit the ownership by railroads of stock in coal mining companies. A bill to make the clause more effective in this respect was introduced in the House of Representatives by Mr. Wanger of Pennsylvania on the 13th of May, 1909, only ten days after the decision of the Supreme Court. This bill, which provided specifically that the ownership of the stock of a subsidiary corporation should be held to constitute an interest (either direct or indirect) in the product of that corporation, was referred to the Committee on Interstate and Foreign Commerce. It seems, however, never to have emerged from committee. In

the following year, toward the close of the debates on the Mann-Elkins Act, an attempt was made by Senator Bailey of Texas (who had taken a prominent part in framing the commodity clause of the Hepburn Act) to secure the adoption of an amendment which would clearly prohibit stock ownership. In connection with this subject Senator Bailey remarked that in the light of the Supreme Court decision the prohibitions as to interest, direct or indirect, could have been improved by specifically providing that the ownership of stock in certain corporations should bring the common carrier within the terms of the statute. But, he said "I did not . . . think that necessary, because I was familiar with that line of decisions which have almost uniformly held that a stockholder in a corporation has an interest which disqualifies him as a juror in the trial of any case to which the corporation is a party." [1] Senator Bailey said that he believed he could demonstrate, the Supreme Court to the contrary notwithstanding, that the commodity clause, as originally adopted by Congress, was understood to mean in the debate exactly what was proposed by his present amendment.[2] His amendment was defeated, however, after a brief discussion, by 25 to 31, — 36 not voting.[3] Another amendment, not so far-reaching, introduced by Senator Crawford of South Dakota, was rejected without a roll call.[4]

The Supreme Court, as we have seen, declared the commodity clause constitutional. Its interpretation of the clause, however, appeared to render it ineffective. The Circuit Court had held that the enforcement of this clause would make it necessary for the anthracite

[1] Cong. Record, June 1, 1910, p. 7212.
[2] Ibid., p. 7210.
[3] Ibid., p. 7218.
[4] Ibid., June 2, 1910, p. 7252.

carrying railroads either to cease transporting coal to other states,[1] or to divest themselves of all title or interest, direct or indirect, in their coal properties, by a compulsory sale of their coal lands and their stocks in coal companies. The Supreme Court adopted, however, an entirely different interpretation. It held that the "interest" referred simply to a "legal" interest and that a railroad could not, therefore, be said to be interested, either directly or indirectly, in the mining of coal, merely because it owned all the capital stock of a coal company which conducted the mining operations. This interpretation appeared to require but slight changes in the conduct of the coal business, as most of the railroads did not mine coal directly, but merely owned the stock of coal mining companies. The only anthracite railroads which seemed to have any "legal" interest in the coal transported by them, and which were, therefore, affected by the decision, were the Lackawanna and the Delaware and Hudson, both of which mined coal directly. These roads proceeded at once to reorganize their affairs.

The Lackawanna took advantage of that part of the decision of the Supreme Court which held that a railroad might carry in interstate commerce an article mined by it, provided it had in good faith, before the act of transportation, dissociated itself from the commodity so mined. The Lackawanna continued to mine coal, and to transport it in interstate commerce, but it endeavored to dissociate itself from the coal prior to the act of transportation by selling it to another company. On August 1, 1909, the sales division of the Coal Department of the railroad was discontinued, and the Delaware, Lackawanna and Western Coal

[1] Except, of course, the coal transported for independent producers.

Company, with a capitalization of $6,590,700, was organized under the laws of New Jersey.[1] On August 2 a contract was made with the coal company, whereby the railroad agreed to turn over to the coal company its present stocks of coal, and to sell all the coal thereafter to be mined or purchased by the railroad for a certain per cent of the tidewater price, — the basis being that generally prevailing in the anthracite region.[2] The control of the coal company was vested in the same hands as was the control of the railroad, its stock being purchased by shareholders of the railroad, with funds provided by the railroad. Tho paying unusually large dividends, the Lackawanna had for several years been accumulating a large surplus. The organization of the coal company offered a good opportunity for distributing some portion of this surplus. A stock dividend of 15 per cent was declared (apparently in violation of the express prohibitions of its charter), and in addition an extra dividend of 50 per cent payable in cash. Stockholders of the railroad were then given the option of using one-half of this extra dividend to purchase at par stock in the newly organized coal company.[3] As a result the stockholders of the two companies became practically identical, and harmonious relations were assured. The president and one of the vice-presidents of the railroad have from the beginning been two of the seven directors of the coal company, and this vice-president has regularly been the president of the coal company.[4] Under this arrange-

[1] Annual Report of the Lackawanna Railroad, 1909, p. 10.

[2] Contract between the railroad and the coal company. See original petition in U. S. v. D. L. and W. R. R. Co., and the D. L. & W. Coal Co., in the District Court of the United States for the District of New Jersey. Referred to hereafter as Original Petition.

[3] Annual Report of the Lackawanna Railroad, 1909, p. 11.

[4] Original petition, p. 14.

ment, however, it was possible that through the sale of the stock of one or the other of the two companies this community of interest might in time be dissolved. The danger that any conflict of interest would thus arise, which might jeopardize the future traffic of the railroad, has been obviated by the ingenious provision that the contract between the railroad and the coal company is terminable upon six months' notice by either party.[1] By such a device the coal company became in reality a mere subsidiary selling agency of the railroad.[2]

The operations of the coal company have proved to be highly profitable. From almost the very beginning it has paid 10 per cent dividends and in 1913 it declared an extra dividend of 20 per cent,[3] while at the same time it was building up an enormous surplus.

This method of conforming to the decision of the Supreme Court has been recently attacked by the Government in a suit brought against the Delaware, Lackawanna and Western Railroad and the Delaware, Lackawanna and Western Coal Company on February 13, 1913. The bill of the Government recites [4] that the present arrangement does not divest the railroad of all interest in the coal transported by it, as required by the commodity clause. It is charged that the coal company is and must always be subservient to the will of the railroad and those who control it. The stockholders of the railroad have constituted the dominant stockholders of the coal company, and probably always

[1] Contract in Original Petition, p. 33.

[2] The coal company agreed to purchase all the coal offered by the railroad, and no other, unless necessary to comply with contracts then outstanding, and it has always leased all the necessary trestles and storage plants from the railroad. Contract in Original Petition, pp. 27–30.

[3] Chron., 96: 949, 1913.

[4] Original Petition, p. 20.

will. They elect its officers, determine its policies, and, moreover, they may take away its sole business upon six months' notice. If its conduct shall fail to meet with their approval, it may be deprived of all benefits under the sales contract, and its business quickly destroyed. In such event a similar subterfuge could be organized, and the profits of the entire business be secured to the stockholders of the railroad.

The Government also charges that the contract between the railroad and the coal company is in restraint of trade, and an attempt to monopolize the coal business along the railroad's lines in violation of the Sherman Anti-Trust Act.

The Delaware and Hudson, like the Lackawanna, was directly engaged in the mining of coal, but it had for several years sold all of its larger sizes of coal at the mines, prior to the act of transportation. This practice had not been followed, however, for the smaller sizes. As the result of the decision of the Supreme Court the railroad, on June 1, 1909, made a contract with the Hudson Coal Company, all of whose stock was owned by the railroad, whereby the coal company agreed to buy at the pit mouth all the coal produced from the mines belonging to the railroad.[1] The Delaware and Hudson, therefore, resorted to the same scheme for dissociating itself from the coal transported by it as had been followed by the Lackawanna, except that the organization of a special company to purchase the coal was unnecessary, as the railroad already owned the stock of a subsidiary, which could be used for that purpose. It remains, however, to be judicially determined whether the Delaware and Hudson has, in good faith, dissociated itself from the coal prior to the act of trans-

[1] Annual Report of the Delaware and Hudson Company, 1909, p. 9.

portation, as the railroad owns the total capital stock of the coal company offering its product to the railroad for shipment. If, however, as stated in the Annual Report of the Company, the Delaware and Hudson is not engaged in the interstate transportation of anthracite, as it sells within the state of Pennsylvania all the coal produced from its mines,[1] the prohibitions of the commodity clause do not apply to it.

The interpretation put upon the commodity clause by the Supreme Court in 1909 gave little ground for the belief that the legislative prohibitions would materially affect the anthracite coal situation. A case recently decided by the Supreme Court, however, indicates that the commodity clause may yet prove more effective than was commonly supposed, and that some further changes in the conduct of the business may be necessary. The Supreme Court, after rendering its decision on the constitutionality of the commodity clause, remanded the case to the Circuit Court for such further proceedings as might be necessary to enforce the statute as it had been interpreted. The Government thereupon amended its original bill against the Lehigh Valley.[2] In the second petition it was charged by the prosecution that tho the Supreme Court had held that stock ownership by a railroad company in a *bona fide* corporation did not make it illegal for the railroad to transport in interstate commerce commodities mined by this corporation, yet the Lehigh Valley Coal Company was not a *bona fide* mining corporation, but a mere agency or department of the railroad. This being the case, the railroad has at the time of transportation an interest, in a legal

[1] Annual Report of the Delaware and Hudson Company, 1909, p. 11.

[2] The Government did not amend its bills against the other railroads, regarding the Lehigh Valley suit as a test case.

sense, in the coal thus transported and has not, therefore, in good faith dissociated itself from the ownership of the coal. Evidence was introduced to show that the Lehigh Valley Railroad used the coal company as a mere device to enable it to evade the prohibitions of the commodity clause.[1] The Circuit Court, however, on March 7, 1910, denied the request of the United States for leave to file the amended bill and upon motion of the railroad counsel dismissed the bill absolutely.[2] The Government appealed from this decree to the Supreme Court, which, on April 3, 1911, rendered a decision reversing the lower court. The Supreme Court in a discussion of the legal points involved sharply criticized the Circuit Court for its refusal to permit the Government to file the amended bill. We are concerned here, however, primarily with the opinion of the Court as to the relation of the coal company to the railroad. In the words of the Court, "While this decision (the decision in the commodity clause case) expressly held that stock ownership by a railroad company in a *bona fide* corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting the commodities manufactured, mined, produced or owned by such corporation, nothing in that conclusion foreclosed the right of the Government to question the power of the railroad company to transport in interstate commerce a commodity manufactured, mined, owned or produced by a corporation in which the railroad held stock and where the power of the railroad company as a stockholder was used to obliterate all distinctions between the two corporations."[3] The Supreme Court held that

[1] 220 U. S. 268–270.

[2] Ibid., p. 270.

[3] Ibid., pp. 271–272.

the facts averred " tended to show an actual control by the railroad company over the property of the coal company and an actual interest in such property beyond the mere interest which the railroad company would have had as a holder of stock in the coal company." [1] It was further held that the use of stock ownership in another corporation for the purpose of destroying the entity of the corporation and commingling its affairs with the affairs of the railroad, so as to make the two companies virtually one, brings the railroad company so acting within the prohibitions of the commodity clause.[2]

The Supreme Court remanded the Lehigh Valley case for a determination of the fact whether the Lehigh Valley Coal Company was or was not a department of the railroad. In accordance with this ruling, the Circuit Court permitted the filing of an amended complaint. The Government thereupon filed in the Circuit Court at Philadelphia on the 6th of June, 1911, a bill against the Lehigh Valley Railroad, charging as before that the various coal companies owned by the railroad were not *bona fide* concerns, but mere devices for evading the commodity clause. Without waiting for the decision of the Court, the Lehigh Valley effected a readjustment of its affairs. On January 22, 1912, the Lehigh Valley Coal Company, secured the incorporation, under the laws of New Jersey, of a new corporation, the Lehigh Valley *Coal Sales* Company, with an authorized capital stock of $10,000,000, of which $6,060,800 was issued upon the organization of the company. On March 1, 1912, the Lehigh Valley Coal Company entered into a contract with the Coal Sales Company, whereby the latter was to purchase, ship, and sell the coal mined, or otherwise acquired

[1] 220 U. S. 272. [2] Ibid., p. 274.

by the Coal Company.[1] On the same day in which the Lehigh Valley Coal Company authorized the organization of the Coal Sales Company, the Lehigh Valley Railroad declared a special ten per cent cash dividend,[2] which could be used for subscriptions to the stock of the newly organized corporation. The railroad, therefore, in effect provided its shareholders with funds, with which they could purchase the stock of the new company without any expense to themselves. Should the Lehigh Valley Coal Company, which mines the coal, be held by the Court to be a mere department of the railroad,[3] it will be claimed that the coal company has disposed of its coal to the Coal Sales Company, and that "Neither the Lehigh Valley Railroad Company nor the Lehigh Valley Coal Company has any ownership in the stock of the Sales Company or any interest, direct or indirect, in the coal transported."[4]

Unless indeed our courts shall yet hold that a railroad does have an "interest" in coal offered for transportation by a company whose stockholders are the same as those of the railroad, it is obvious that the commodity clause must be made more specific, if the underlying principle is to be applied with any considerable degree of success.

As to this underlying principle, there was, as we have seen, substantial agreement in the debates preceding the passage of the Hepburn bill. Senator Foraker himself, one of the three senators who finally voted against the bill, expressed himself in favor of

[1] Annual Report of the Lehigh Valley Coal Company, 1912, p. 6.

[2] Ibid., p. 14.

[3] This suit was dismissed without prejudice on January 27, 1913, by consent of both parties but it is expected that a new action will be brought by the Government. Chron., 96: 360, 1913.

[4] Annual Report of the Lehigh Valley Railroad, 1912, p. 13.

the principle of the commodity clause, saying that he did not believe that a common carrier should be engaged in any business except only that of a common carrier. But even tho further Supreme Court decisions should restore vitality to the clause, so that in other industries it may be thoroly enforced, it must be said that it is extremely doubtful whether in the anthracite industry competitive conditions would be thereby restored. The railroads or their subsidiary coal companies now own or control over 90 per cent of the total output of anthracite coal, and they own in fee simple an even larger percentage of the yet unmined coal. Were the coal companies to be separated from their present railroad control, the first result would be, in all probability, the organization of a coal trust, or at least some form of agreement among the coal companies to restrict output or to fix prices. Further regulative measures would doubtless then be attempted. Just what these measures would be is bound up in the larger problem of public ownership of the natural resources of the country versus private ownership under public regulation — a far reaching problem concerning which the people of the United States have not as yet a fixed and definite policy.

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